

Change-exchange: some remarks for the constitution's birthday

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From time to time, as the changeable political situation in Ukraine demands, an ordinary Ukrainian's vocabulary is enriched with strange and hard-to-pronounce words. The 1997 political debate developed under the slogan of prolongation, i.e., the suggested extension of the 13th parliament's term. In 2000, the number one of the country's political vocabulary has been implementation.

This notion and related processes of amending the Constitution have become a major logical ingredient of the current political situation in Ukraine.

The legislative intrigue of implementation of the April 2000 referendum results has entered a new political gyre following a recent verdict of the Constitutional Court on the compliance of the President's draft bill On Making Changes to the Constitution of Ukraine after the Results of the All-Ukrainian Referendum Following the People's Initiative with Articles 157 and 158 of the Constitution. So far the Constitutional Court judges said nothing about the compliance (or non-compliance) with the Constitution of the other, alternative draft, submitted by Oleksandr Moroz, MP, and Serhiy Holovaty, MP. According to the rapporteur of the Constitutional Court, Judge Mykola Koziubra, the MPs' draft is bigger in volume and is still being evaluated (Ukraina Moloda, June 30, 2000). That comment's logic suggests that the only reason is the size, and not the contents of the alternative draft and that the Constitutional Court will make its final verdict on both of the drafts before July 15, when the MPs will break for their summer vacations. However, shortly before the Constitutional Court announced its verdict on the President's draft, President Leonid Kuchma, when asked to access chances of the Moroz-Holovaty draft to be recognized as constitutional, announced: I believe that then we do not have a Constitutional Court. I beg your pardon, for it is clear even for such an ordinary citizen that what has been submitted by the President was the decision [based on the] volition of the people, and was once verified by the Constitutional Court. But the thing proposed by Holovaty and Moroz is the old mare's nest, I can't say it in any other way, for I see <...> [a Russian colloquialism that is close to English to have rats in the attic follows], they want to transform the constitutional order in Ukraine with their own, that is, with the others' hand. This does not happen in life, and I will not let it [happen] (UT-1, UTN-Panorama, June 28, 2000). No matter whether the President is prepared to let it or not, the Constitutional Court will have to announce its final verdict soon. However, it is clear that the President's words could not fail to influence, if only indirectly, the Constitutional Court's verdict about the alternative draft.

Though, in any case the procedure of amending the Constitution has every chance to take a long time. In April 2000, the President decreed establishment of a working group to prepare amendments to the Constitution. Members of the working group included informal manager of the parliament and leader of the Democratic Union Oleksandr Volkov, MP, and one of the party's ideologists Yuri Levenets, both seen as masterminds behind the referendum. One can only guess how this working group will function in the future. However, the Constitutional Court's verdict itself may ensure that the process of amending the Constitution lasts long. Although the President's draft bill was supported by seventeen judges of the Constitutional Court, and only two judges, V. Shapoval and M. Selivon, had their own opinions on the matter, the Constitutional Court's verdict contained certain comments that cannot be ignored.

Article 157 of the Constitution stipulates that Ukraine's Fundamental Law cannot be changed if the changes envisage abolition or limitation of human rights and civil liberties, or if they are aimed at liquidation of independence or infringing on territorial integrity of Ukraine. According to the Constitutional Court's verdict, the provision of Article 1 of the draft bill for amending Article 76 of the Constitution in order to reduce the number of MPs from 450 to 300 does not contradict Article 157. Following the referendum results, the President's draft proposed to withdraw part 3 of Article 80 of the Constitution that provided for people's deputies' immunity to prosecution. The draft seeks to limit the parliamentary immunity only to make MPs immune to criminal prosecution for voting results or statements they make inside the parliament or in their constituencies, except liability for libel or abuse. Commenting on the provision, the judges argued that these changes concern only the special status of people's deputies and do not influence the contents of constitutional human rights and civil liberties (DINAU, June 29, 2000) and, therefore, withdrawal of part 3 of Article 80 does not contradict Article 157 of the Constitution. Similarly, the Constitutional Court ruled that it would be legitimate to amend Article 90 with a new part 3 that gives the President the right to dissolve the parliament if the latter fails

to form a permanently functioning parliamentary majority within one month or fails to approve a budget, prepared and submitted by the Cabinet of Ministers in accordance with the specified procedure, within three months. According to the verdict, the inclusion of these presidential powers to the Constitution does not have a direct impact neither on the volume and contents of human rights and civil liberties, nor on independence and territorial integrity of Ukraine, and, therefore, does not run counter the requirements of Article 157.

The Constitutional Court made critical comments concerning individual provisions of the bill. Specifically, the judges argued that if part 3, stipulating deputies' immunity, was simply withdrawn from Article 80 of the Constitution, as the President has suggested, the lack of due clarity in the Constitution regarding defining the contents of deputies' immunity in practice may cause ambiguity in understanding of part 1 of that article (Den, June 30, 2000), i.e., de facto broaden the scope of parliamentary immunity. The Constitutional Court was also reluctant to support introduction of the notion of permanently functioning parliamentary majority. The verdict demanded that the term be clarified and that proper rights be given to the minority, as ambiguity of guarantees for functioning of such a minority may cause disruption of one of the main foundations on which the societal life of Ukraine is based - [that is] its political and ideological diversity ([granted by] Article 15 of the Constitution), and the limitation of constitutional rights of the citizens, stipulated by Articles 34 and 38 of the Constitution, the Constitutional Court's verdict read (Den, June 30, 2000).

Therefore, given the verdict, the Verkhovna Rada is facing a real challenge. If the MPs consider the Constitutional Court's comments (which they must do), they will have to address the Constitutional Court again for its verdict on the revised draft bill. It is hard to say now how much this generally time-consuming procedure will take. According to one of the fathers of the Ukrainian Constitution Mykhailo Syrota, MP, the process of amending the Constitution is likely to last for years (Ukraine Moloda, June 30, 2000). The practice of law-making, and particularly the lengthy debates that preceded the birth of the 1996 Constitution suggest that he may be perfectly right.

Ironically, the Constitutional Court's verdict on amending the Constitution was made public on the fourth anniversary of this state's Fundamental Law, adopted in 1996 after years of negotiations, tension and compromise. The concept of a new constitution was approved by the 12th parliament of Ukraine on June 19, 1991, and the parliament resolved to bring the draft for the nation-wide discussion that lasted till November 1, 1992. On October 3, 1993, the draft, with comments and suggestions, was debated by the Verkhovna Rada, and on October 28, 1993 the text of the draft was published in the official media outlets. On September 21, 1994 the Verkhovna Rada of Ukraine resolved to establish the Constitutional Commission in charge of preparing a new draft of the Constitution, and approved the list of the Commission members on November 10, 1994.

Further steps towards the new Constitution were made only a year after, in September 1995. Speaking at a session of the Constitutional Commission on September 18, 1995, President Leonid Kuchma announced he would initiate this process, and this year there is a possibility to consider the draft Constitution of Ukraine in a normal civilized way through the Constitutional Commission... (BBC, September 18, 1995). In fact, as many as seven drafts of the Constitution were written during the presidency of Leonid Kravchuk, and one of the drafts was published for a nation-wide debate which was never finalized.

The end of 1995 was marked with continuing discussions about the would-be constitution and negotiations over the draft between different branches of power and influence centers. On November 29, 1995 it was announced that the working group of the Constitutional Commission had completed its draft and submitted it to the Constitutional Commission for review. Among other things, the draft constitution stipulated that no ideology would be seen as mandatory in Ukraine, prohibited censorship of the mass media and banned calls for changing the constitutional order of Ukraine through violence, propaganda or war and inter-ethnic ire, creation of militarized formations and secret associations.

Ukraine's legislature was expected to be represented by a bi-cameral parliament - the National Assembly or the Verkhovna Rada that would consist of the House of Deputies and the Senate. According to the draft, the President would be the head of the state. On March 11, 1996, the Constitutional Commission submitted the draft to the Verkhovna Rada for further debates, but the parliament seemed to be in no hurry to accept the draft for consideration officially. Meanwhile, various political forces engaged in dramatic political battles and bargaining over the draft.

In addition to stipulating human rights and civil liberties, and providing for private property rights, the new constitution specified the division of powers and their areas of competence. It also outlawed creation and activity of political parties, whose program goals or actions are aimed at liquidation of independence of Ukraine. The right to call referenda was given both to the President and the Verkhovna Rada. Under clearly specified conditions, the parliament also received the right to impeach the President, and the President received the right to dissolve the parliament.

The Verkhovna Rada's powers included mainly giving consent : to appointment of the Prime Minister by the President, to appointment and dismissal of heads of the Antimonopoly Committee, the State Property Fund, the State Committee for Television and Radio Broadcasting, to the appointment and dismissal of the Attorney General, and the appointment of one-third of the Constitutional Court. The President's powers included the right to appoint and dismiss the Prime Minister and, at the recommendation of the Prime Minister, appoint and dismiss members of the Cabinet and heads of other central bodies of the executive power. A separate article referred to the National Security Council (later renamed into the National Security and Defense Council). The Constitution also specified the powers of the Prime Minister who leads the work of the Cabinet of Ministers, directs it towards the implementation of the Program of Action of the Cabinet of Ministers, approved by the Verkhovna Rada of Ukraine. The Cabinet was identified as the supreme executive body, responsible to the President and <...> controlled by, and accountable to the Verkhovna Rada of Ukraine. A separate section described the authority of the judiciary branch.

In four years since the adoption of the Constitution, a number of efforts have been made to amend it. They started at the end of 1996, when the draft bill On the Cabinet of Ministers of Ukraine was debated in the first reading on November 12, 1996. According to the draft, the Cabinet of Ministers should be a supreme body in the system of the executive power in Ukraine , and the Verkhovna Rada has the right to raise the issue of the vote of no-confidence in the government <...>; the appointment of Prime Minister and the adoption of the program of action of the Cabinet should be done in the parliament in the open voting. The draft bill also specified the order of terminating the authority of the Cabinet of Ministers in four cases: election of a new President; adoption by the President of a decision to terminate the authority of the Prime Minister; the adoption by the Verkhovna Rada of the resolution on no-confidence in the Cabinet of Ministers of Ukraine; the resignation or death of the Prime Minister (Za Vilnu Ukrainu, November 19, 1996). Commenting on the initiative, then head of the Presidential Administration Dmytro Tabachnyk argued that the Verkhovna Rada decision of November 12 is an attempt to revise and even change the Constitution (Zerkalo Nedeli, November 16, 1996).

The first substantial attempt to interpret the Constitution was made by Speaker of the 13th parliament Oleksandr Moroz. In January 1997, he announced that there are some discrepancy between certain articles of the Constitution, and there is a need to write down norms so that their final impact on legal relations could be understood (UTN, January 24, 1997). He argued that the right to give official interpretation of the Constitution and the laws should belong to the Verkhovna Rada, and not the Constitutional Court, and that the President should be elected by the parliament's session and not through the direct general elections (UTN, January 28, 1997). The Speaker's statements caused vigorous protest of the President's circle. Then first presidential assistant Volodymyr Lytvyn accused the Speaker of attempts to revise the fundamental provisions of the Constitution in order to change the form of state governance (TSN, January 20, 1997). Under the sobering shower of criticism from all sides, Oleksandr Moroz described his ideas as belonging to the sphere of rather theory that the issues that should be addressed nowadays (Den, February 5, 1997).

The second idea to interpret the Constitution also belonged to Oleksandr Moroz. In May 1997, he argued that the new Constitution requires changes in the form of improving the mechanism of overriding the President's veto on adopted bills, for the inability to override the veto with two thirds of the votes may cause the halt of the law-making work (TSN, May 20, 1997). Finally, Oleksandr Moroz concluded there was a need to debate as many as 27 amendments that concerned the parliament's powers: My position with regard the term of this parliament remains as before: I believe this must not be done; as to changing the term of this parliament from four to five years, I support this proposal but it should be implemented for the next parliament. He also argued against the Constitutional provision for electing judges of the Constitutional Court for their lifetimes and some issues of relations between the parliament and the President , i.e., the procedure of overriding the veto (TSN, July 18, 1997). A vigorously emotional session on tentative amendments to the Constitution was held on August 28. Though, at that time the majority of MPs objected to mending the holes in the Fundamental Law, and none of the three proposed options of amending the Constitution gathered the necessary support. Hence, the possibility of amending the Constitution in 1997 was formally blocked, as Article 158 of the Constitution prohibits submitting a bill anew within one year after its formal rejection by the parliament. Also, the parliament cannot amend any provision of the Constitution more that once within its entire term.

In 1998, it was turn for Speaker of the 14th parliament Oleksandr Tkachenko to discuss prospects for amending the Constitution. Shortly after being elected to the position, he announced the intention to amend the Constitution so that to give the parliament the right to approve appointments and dismissals of the prime minister and vice prime ministers, heads of ministries of force , and the attorney general. Meanwhile, Speaker Tkachenko spoke against holding parliamentary debates on making amendments

to the Constitution that would limit the President's powers (Kievskie Vedomosti, July 10, 2000). However, the intentions did not go any further. In 1997-1998, the parliament was overwhelmed by debates over possible abolition of the deputies' immunity. In November 1998, Yevhen Marchuk, MP, told the press: I accept the possibility of making amendments to the Constitution to narrow the deputies' immunity in cases if a deputy is caught when committing a crime, detained with clear evidence of having committed a crime, or if absolute documented proof of a crime have been received (Den, November 4, 1998). Finally, the issue that had been debated so loudly and vigorously, simply vanished from the agenda, as it required amending the Constitution that would hardly be supported by the constitutional majority (300) of votes.

Ukraine is living through yet another period of expectation of changes, changes in the Constitution included. Most likely, the battles over amending the Constitution will get a new boost in Autumn 2000, after the final verdicts of the Constitutional Court on both of the drafts. Then, the Verkhovna Rada, armed with the verdicts, will start the implementation process. According to Deputy Speaker of the parliament Stepan Havrysh, this is a complex issue but it will test once again the majority's ability to perform wishes of their voters (Holos Ukrainy, June 21, 2000). It is also likely that the implementation process, no matter how long the procedure will last, will test the viability of this parliament and the possibility of early parliamentary elections, and the implementation process will make a strong impact on shaping Ukraine's political map in the near future.